Commonwealth of Massachusetts
State Ethics Commission

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CONFLICT OF INTEREST OPINION
EC-COI-98-6

FACTS:

You are a member of a law firm, a professional corporation ("firm"). Since August 1992, you have also been serving as an unpaid Special Assistant Attorney General ("SAAG") of the Office of the Attorney General ("OAG"). As a SAAG, you represent the Commonwealth in a lawsuit against private parties ("case").

For several years, in compliance with G. L. c. 268A, §4, you have recused yourself from working on, and have renounced any share in the law firm's profits from, particular matters in which the firm represents private parties and which are pending in the OAG during the 365-consecutive day periods in which you served more than sixty days as a SAAG. You anticipate, however, that the case again will require you to serve on more than sixty days during a 365-day period. If that becomes necessary, you may have to stop working on that case and may have to resign as a SAAG in order to avoid violating G. L. c. 268A, §4 because you doubt that you will be able to continue to recuse yourself from firm matters pending in the OAG.

You believe that your resignation would not be in the Commonwealth's best interest because of your long history with the case. Moreover, you believe that your resignation would deter other attorneys from serving as SAAG's on a *pro bono* basis because they might be unable to forbear from working on private particular matters pending in the OAG and/or would not be willing to give up their law firms' profits from such particular matters.

QUESTION:

For purposes of calculating the 60-day limitation in the phrase " . . . in the case of a special state . . . employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days" as it appears in §4 of G. L. c. 268A, should service on part of a "day" constitute one of the "sixty days"?

ANSWER:

Yes. For the purposes of G. L. c. 268A, §4,[1/] the term "serves" as it appears in the phrase "serves on no more than sixty days" means substantive services, as described below, performed on any portion of a calendar day.

DISCUSSION:

As an unpaid SAAG, you are a special state employee[2/] for purposes of the conflict of interest law. As such an employee, you are subject to §4 of G. L. c. 268A.

Section 4(a) provides that "no state employee shall otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the commonwealth or a state agency, in relation to any particular matter

in which the commonwealth or a state agency is a party or has a direct and substantial interest." In addition, §4(c) provides that "no state employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the commonwealth or a state agency for prosecuting any claim against the commonwealth or a state agency, or as agent or attorney for anyone in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest."

Section 4 applies to a special state employee only in relation to particular matters in which he has at any time participated[3/] or over which he has or within one year has had official responsibility[4/] or which are "pending in the state agency in which he is serving." The restriction concerning matters "pending in the state agency . . .," however, "shall not apply in the case of a special state employee who *serves on* no more than *sixty days* during any period of three hundred and sixty-five consecutive days." *See* G. L. c. 268A, §4. (emphasis added).

We begin by noting that the terms "serves" and "days" as they appear in §4 and throughout the conflict law are not defined in the statute. When construing statutory language, we first review the plain meaning of the statute. *Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority,* 292 Mass. 811, 813 (1984); *O'Brien v. Director of DES,* 393 Mass. 482, 487-88 (1984). In common usage, "serves" means to be of use or answer the needs of or to perform the duties of (an office or post). *Webster's Third New International Dictionary of the English Language (unabridged)* (1993). "Day" is defined as "the mean solar day of 24 hours beginning at mean midnight" or "the hours of the daily recurring period established by usage or law for work (an 8-hour ~)." *Id.* As one commentator has noted, the word "serves" suggests "rendering service more than it does availability for service." Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U.L.Rev. 299, 340 (1965).

The Commission's interpretation of §4 has been consistent with the plain meaning of these terms. "A day is not counted for the purposes of the 60-day limit unless *services are actually performed*." *EC-COI-90-12*[5/] (emphasis added); *85-49.* To calculate days served for purposes of the sixty-day limit, we have concluded that a "special" employee who has served only part of a day is considered to have served for a complete day. *EC-COI-80-31; 80-32; 80-66; 84-129; 85-49.* Similarly, if an attorney serving as a special employee assigned one of his firm's associates to perform work under his supervision, the employee is considered as having served on each day in which the associate performed such billable services. *EC-COI-84-129; 85-49*.[6/] In view of our advice that, for example, a SAAG who serves more than sixty days must cease representing private clients before the OAG*, EC-COI-82-49*; *82-50,* we have advised special employees that they must keep accurate records of their daily services. *See e.g. EC-COI-82-49; 82-50; 90-12; 90-16*.

Additionally, the legislative purpose behind §4 also supports our interpretation. We have noted that the Legislature's inclusion of the sixty-day limit in §4 recognizes that special state employees whose services exceed sixty days in a one year period are likely to possess and exercise influence in their agencies' actions. *EC-COI-85-49*. The goal of §4 is to prevent divided loyalty as well as influence peddling. *Commonwealth v. Cola,* 18 Mass. App. Ct. 598, 610 (1984). *See also, Edgartown v. State Ethics Commission,* 391 Mass. 83, 89 (1984). "The 60-day period . . . is an arbitrary, but necessary, line drawn by the legislature to prohibit a special state employee from eventually doing what a regular state employee could not. . . . The §4 restriction recognizes that the opportunities to influence pending agency matters increase with the amount of time spent working for that agency." *EC-COI-91-5. See also EC-COI-96-1*. Further, as we discussed in some detail in *EC-COI-96-1*, the federal conflict of interest law,

18 U.S.C., §§203 and 205, upon which §4 is based contains a similar 60-day limitation and appears also to be intended to guard against abusing inside influence.[7/]

As a result of your situation, you ask us to reconsider the Commission's precedent and re-examine the method for calculating the sixty-day limitation.[8/] You argue that a litigator serving as a SAAG in a complex law suit will likely serve more than sixty days when work on any part of day counts for an entire day. Some days may include only a five minute telephone call, others may include several hours preparing a brief. In either event, you believe that such work does not make the litigator so closely allied with the OAG that he would be able to use the leverage of his SAAG position to exert influence on other particular matters that are pending in the OAG and in which the litigator is involved in his private practice. Finally, you assert that it is the unusual case that would require a litigator to devote more than sixty eight-hour days in any 365-day period. Such a case, you believe, would seem to be the only one in which the sixty-day provision of § 4 ought to be implicated.

The logical result of your argument is that the calculation of the sixty-day period should be based on services performed over a total of sixty, eight-hour days (480 hours), rather than on services performed on any part of a day.[9/]

We disagree with such a requirement because it would subvert the Legislature's intent behind the sixty- day provision, as derived from the language of the statute and the policy supporting a time limit for special employees as we discussed above. We note that had the Legislature meant the terms "serves on" and "sixty days" as they appear in §4 to mean "serving for sixty, eight hour days," it could have applied a more specific hourly limit as it did in G. L. c. 268A, §1(o) (state employee deemed "special state employee" if he does not earn compensation for "more than eight hundred hours during the preceding three hundred and sixty-five days") or G. L. c. 268A, §7(b) ("the employee is compensated for not more than five hundred hours during a calendar year"). In view of the canon of statutory construction that, "when the Legislature has employed specific language in one paragraph, but not in another, the language should not be implied where it is not present," we decline to infer an hourly standard. *Commonwealth v. Galvin,* 388 Mass. 326, 330 (1983); *see also, Leary v. Contributory Retirement Appeal Board,* 421 Mass. 344, 348 (1995); *Tesson v. Commissioner of Transitional Assistance,* 41 Mass. App. Ct. 479, 482 (1996).[10/] Further, the Legislature's use of the phrase "serves *on*" suggests that service on any part of day should count for purposes of the sixty-day provision, rather, than as you argue, that only a full eight-hour day of services should be considered. We must consider each word in the statute and cannot assume that the word "on" should be disregarded. *Commissioner of Corp. & Tax. v. Chilton Club,* 318 Mass. 285, 288 (1945).

You and the OAG also suggest that we consider a *de minimis* standard, arguing that a brief telephone call on only one day not be counted as service on that day for purposes of the sixty-day period. The OAG has suggested that we could designate a period of time, such as two hours, that an individual must work on a day before he is determined to have served a day for purposes of the sixty-day calculation. In our precedent, we have considered the substance of the work performed in determining whether a special employee has performed services. We stated in *EC-COI-85-49* that we distinguish "between the substantive legal services the contract calls for [the employee] to provide, and the ancillary services that go along with those substantive services, such as secretarial, word-processing, and photocopying services." In that opinion, we concluded that time spent on substantive legal services, whether performed by lawyers or paralegals must be counted as services performed on a day and included in the

sixty-day calculation. Time spent on purely ancillary services, however, need not be counted. We noted that we made such a distinction between ancillary and substantive work only in relation to paralegals and non-legal support staff and stated that any work an *attorney* performed under the contract is presumed to be substantive, therefore "all attorney time must be counted towards the sixty-day limit." *Id. at n. 3.*[11/] Thus, a five minute telephone call that covers substantive legal issues cannot be discounted simply because it consumed only five minutes of a day.

Upon further reflection, after reviewing *EC-COI-85-49*, we conclude that some of the functions a lawyer or paralegal perform may be ancillary and should not be counted toward the 60-day limit. For example, a telephone call that concerns only non-substantive matters (e.g., scheduling meetings) might not be included in calculating the sixty-day limit. Similarly, administrative business that does not involve any substantive matters, such as a call to locate missing copies to an enclosure would not count as service on a day for calculating the sixty-day limit.[12/]

Thus, we modify our advice in *EC-COI-85-49* and now conclude that non-substantive functions lawyers or paralegals perform need not be counted towards the sixty-day limit. We re-emphasize, however, that for purposes of his keeping an account of service on a day for purposes of the sixty-day limit, a special employee must continue to count service involving, for example, only a brief conversation covering substantive matters.

In conclusion, we defer to the specific legislative determination of the time limitation under which a special employee currently operates and must construe that provision as it is written. *Brennan v. Election Commissioners of Boston,* 310 Mass. 784, 789 (1942); *City Council of Peabody v. Board of Appeals of Peabody,* 360 Mass. 867, 867 (1971); *Tesson v. Commissioner of Transitional Assistance,* 41 Mass. App. Ct. 479, 482 (1996). The Legislature established the sixty-day limit of §§4, 11 and 17 of G. L. c. 268A through St. 1962, c. 779, §1, which, like the sixty-day limit of those sections' federal counterparts, has not changed since it was enacted.[13/] We reiterate that for the purposes of the conflict law, the term "serves" as it appears in the phrase "serves on no more than sixty days" means substantive services, as described above, performed on *any portion* of a calendar day.

DATE AUTHORIZED: July 22, 1998

1/ Our analysis will also apply to the county and municipal counterparts, G. L. c. 268A, §§11 and 17 respectively, which contain the same clause as §4.

2/ "Special state employee," a state employee:

(1) who is performing services or holding an office, position, employment or membership for which no compensation is provided, ... G. L. c. 268A, §1(o).

3/ "Participate," participate in any action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

4/"Official responsibility," the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, § 1(i).

5/*See also* Buss, *The Massachusetts Conflict of Interest Statute: An Analysis,* 45 B.U.L. Rev. 299, 340 (1965).

6/"Because the concern addressed by the statute is the potential for influencing pending agency matters if the employee serves more than sixty days, it is clear that the issue is the total number of days on which work is performed for a given project, and not the total number of people who actually perform the work. Thus a day on which more than one firm partner or associate performs any work under the contract will be counted as one day for purposes of calculating the sixty-day limit." *EC-COI-85-49*.

7/Our view has been consistent with the federal government's long standing interpretation of 18 U.S.C., §§203 and 205. The federal Office of Government Ethics (OGE), in applying 5 CFR §2635.807, one of the regulations that implement 18 U.S.C., §§203 and 205, continues to rely on the interpretation set forth in the former *Federal Personnel Manual's* guideline for special government employees:

At the time of [an appointee's] original appointment and the time of each appointment thereafter, the agency should make its best estimate of the number of days during the following 365 days on which it will require the services of the appointee. A part of a day should be counted as a full day for the purposes of this estimate, and a Saturday, Sunday or holiday on which duty is performed should be counted equally with a regular work day.

5 CFR §735 Appendix C (2)(c) (November 9, 1965) (Revised July 1969) *Conflicts of Interest Statutes and Their Effects on Special Government Employees (Including Guidelines for Obtaining and Utilizing the Services of Special Government Employees).* Although most of 5 CFR §735 as it then appeared was substantially changed and rendered obsolete upon the implementation of 5 CFR §2635 (*see Federal Register,* Vol. 57, No. 230, November 30, 1992 at 56433), the OGE continues to rely on this specific guideline when providing advice on what "serves on a day" means for calculating the sixty-day limit.

8/We also have the benefit of a submission on your behalf from the Office of the Attorney General, which also argues for the reexamination and reinterpretation of our precedent.

9/Thus, if such an hourly limit were the standard, special employees would be advised to keep accurate records to calculate such a 480-hour limit, regardless of how those 480 hours were distributed over a 365-day period.

10/Additionally, in view of our discussion above concerning the purpose of the 60-day limitation, we cannot discern how a special employee who serves on only four hours per day over a sixty day period is any less likely to be in a position to exert influence in his agency than one who serves on six hours per day for sixty days. Similarly, it is difficult to distinguish how the employee who serves four hours per day is more likely to be able to exert such influence than one who serves on only two hours per day for a sixty day period. Even under your hourly calculation, each such employee would arrive at the limit at a different number of days over a

365-day period (the four hour per day employee at 120 days, the six hour per day employee at 80 days, and the two hour per day employee at 240 days). *Compare EC-COI-91-5*. Again, had the Legislature believed that an employee's degree of inside influence needed to be measured at the hourly, rather than daily, standard, it could have so specified. Nothing in the statutory language or legislative history suggests that the Legislature intended to permit such disparities by enacting the explicit sixty-day limit. "Our conclusion is consistent with the long-held policy that the provisions of the state conflict of interest law should be broadly implemented and that exemptions for special state employees should be narrowly construed." *Id.*

11/*Cf. EC-COI-87-27* (with respect to §5's purpose to ensure that former state employees do not use their prior governmental associations to derive unfair advantage, "there may be certain communications which relate solely to procedure and which are so **de minimis** so as not to present an opportunity to derive unfair advantage.") (emphasis in the original). *See also United States v. Quinn,* 141 F. Supp. 622, 629 (S.D.N.Y. 1956) (under 18 U.S.C. §281, which was superceded by 18 U.S.C. §203, calls made by a Congressman to inquire of the status of the matter and in which the merits of the case were not discussed were not "the rendition of services of the nature contemplated under the statute." Section 281 prohibited members of Congress from receiving compensation "for any services rendered or to be rendered, . . . in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency . . . .").

12/We do not draw a distinction between so-called "billable" and "non-billable" time because, as in your situation, an attorney serving on a *pro bono* basis does not "bill" his client (although some *pro bono* clients require bills in order to determine the value of the free legal services they receive). Moreover, we would not want attorneys or anyone else serving as special public employees to avoid the sixty-day limit simply by *not* billing even minimal time involving substantive work. *Compare EC-COI-84-129 (*"It would frustrate the statutory policy to permit special state employees to avoid reaching the sixty day limit by assigning their work to other employees in the law firm. Such a construction would elevate technical form over substance in a way which would undermine the statute.")*.*

13/We note that the Commission has no regulatory authority under G. L. c. 268B, §3 to interpret the statute in ways that would change the time limitation, as the OAG has suggested. Any such change, therefore, must be made by the Legislature.